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Hon. Ann Donnelly
United States Magistrate Judge
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Fleurima et. al. v. the City of New York et. al
15-CV-2616

Your Honor:

This office represents the above plaintiffs in this civil rights matter. I write this letter to explain a few issues which the Court might consider when reviewing the JPTO.

In the JPTO, Defendants argue that plaintiff's false arrest and retaliation claims should be barred by reason of a conviction for some of the offenses charged in the November 2014 incident. Defendants also argue that the failure to intervene claims should be barred. With the following background of this matter, it will be apparent why those defense are inapplicable.

Plaintiff was arrested by defendant O'Connor in September of 2014. Ultimately, O'Connor accused plaintiff of possessing marijuana during that encounter which began as a traffic encounter. Plaintiff adamantly denied the allegation and the charge was declined to prosecute by the District Attorney's office. During this arrest, defendant O'Connor noted that plaintiff refused his commands. Plaintiff would claim immediately after the arrest that defendant O'Connor took his Target gift card and house keys and did not return them. Plaintiff made an Internal Affairs complaint as against officer O'Connor charging him with the missing property. Internal Affairs investigated this incident and apparently took a statement from officer O'Connor. The results of this investigation were apparently never reported to plaintiff.

Two months later, in November of 2014, plaintiff was driving a car with a woman passenger, Esty Bianca when they stopped for a light. At the corner, were officers O'Connor and McKenna. When the light turned green, plaintiff drove to the next block to pick up Esty's friend. Officers O'Connor and McKenna, who were on foot patrol, ran or walked after the vehicle. Nothing was placed over a police radio regarding a pursuit at that time. The plaintiff happened to stop midway into the next block.

Officer O'Connor approached plaintiff at the driver's side. According to plaintiff, Officer O'Connor never requested identification or insurance information and almost immediately sprayed mace into the car through the driver's side window which had been opened slightly at the officer's commands. Plaintiff also alleged that O'Connor swung his flashlight into the car hitting plaintiff in the head. Following the mace and when plaintiff rolled up the windows, O'Connor began bashing the windows of the car with a flashlight or asp. Plaintiff then drove away, in fear of his life. For his part, Officer O'Connor admits both spraying mace into the car and bashing the windows but generally argues it was done for his safety. He denies hitting plaintiff in the head with a flashlight or anything else. Officer McKenna would later allege that when plaintiff drove away, he was hit by the car but not injured. When the matter was called into command, the supervisory asked why the stop had been initiated and when no one responded, the car chase was called off. Officers allege the car chase was called off to for the safety of pedestrians generally. Ultimately, the officers alleged that they approached the vehicle during the November stop because plaintiff had driven through a steady red light. At the criminal trial of the November incident, Officer McKenna admitted that plaintiff did not go through a red light but claimed he drove fast and that was the reason they approached the car. Officer alleged that when plaintiff drove away from the officers after having been maced and having his windows bashed in, that he drove recklessly.

Plaintiff was arrested months later for the November incident and charged with P.L. 120.20 Reckless Endangerment in the Second Degree, P.L. 195.05 Obstructing Governmental Administration in the Second Degree, VTL 1151 (A) Pedestrian's Right of Way in Crosswalk and VTL 1212 Reckless Driving. Plaintiff refused a community service offer and proceeded to trial. Following trial, plaintiff was convicted of, upon information and belief, P.L. 120.20 Reckless Endangerment in the Second Degree, P.L. 195.05 Obstructing Governmental Administration in the Second Degree, however he was not convicted of the traffic light offense. Therefore, since at the time plaintiff and his passenger were sprayed with mace and had their windows bashed in, no crime had been committed. It is undisputed that Officer O'Connor maced plaintiff and his passenger while plaintiff was stopped in his vehicle, talking to the officer. The *Heck* issue does not arise because there is an issue of fact as to *when* probable cause arose to arrest for the crimes charged. Having handled the criminal matter, it was apparent to me that it was the driving away from the scene of the incident which the jury questioned and for which Officer McKenna claimed he was hit by the vehicle. Therefore, when plaintiff and his passenger were stopped, with plaintiff's window down and interacting with the officer, no probable cause had arisen and it is for this encounter, including the macing and the bashing of the windows that plaintiff and his passenger claim false arrest. Because issues of fact exist as to when plaintiff was arrested during the November 2014 traffic stop incident, no *Heck* issue is properly invoked in this case. *Laster v. Mancini*, 2012 U.S. Dist. LEXIS 189298, at *26-27 (S.D.N.Y. Sep. 28, 2012) ("As noted, sometimes a conviction resulting from an arrest may be perfectly valid even though the arrest itself was invalid. See Covington, 171 F.3d at 123 (citing Washington v. Summerville, 127 F.3d 552, 556 (7th Cir. 1997)). It is in cases "where the *only* evidence for conviction was obtained pursuant to [the] arrest," id. (emphasis in original), or where a lawful arrest is an element of the crime, see *Heck*, 512 U.S. at 486 n.6, that a claim for false-arrest may not be pursued while the conviction stands.") Similarly, since it was plaintiff's conduct during the encounter with Officer McKenna which was the only evidence of a crime, i.e. fleeing the scene of a traffic stop, *Heck* is is not a bar to plaintiff's claims. See also, *Fifield v. Barrancotta*, 353 F. App'x 479, 480-81 (2d Cir. 2009) ("However, Fourth Amendment claims for unlawful arrest, such as Fifield alleges, do not ordinarily fall within the *Heck* rule, since a finding for the plaintiff would not necessarily "demonstrate the invalidity of any outstanding criminal judgment against the plaintiff," *id.*, at least unless the conviction was dependent on evidence obtained as a result of the arrest.") See also, *Jackson v. Suffolk Cty. Homicide Bureau*, 135 F.3d

254, 256 (2d Cir. 1998) (“However, "if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Heck v. Humphrey*, 512 U.S. at 487 (footnote omitted). Application of these principles requires the court to examine the relationship between the criminal conviction and each of the plaintiff's civil claims.”)

Lastly, following trial plaintiff was not committed to custody and in fact was sentenced to a similar outcome to which he had previously refused, i.e. community service. Since plaintiff was never in custody of the Court, the *Heck* bar has no applicability. *Davis v. Cotov*, 214 F. Supp. 2d 310, 316 (E.D.N.Y. 2002) (“In addition, where the plaintiff's conviction involves a fine rather than imprisonment, a Section 1983 suit is permissible because given that the plaintiff "is not and never was in the custody of the State, he . . . has no remedy in habeas corpus." *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999).

Thank you for your consideration in this matter.

Very Truly Yours:

/S

David A. Zelman, Esq.